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Total Disability Evaluation Under the Louisiana Compensation Act

Wex S. Malone*

In 1932 a lineman named Fred Knispel employed by the Gulf States Utilities Company in Lake Charles fell from a pole and suffered a paresis of the superior oblique muscle of the right eye. When the victim's head was in certain positions with both eyes open, he suffered from double vision. This condition was permanent and it had a marked effect upon his working ability. Knispel's fight for compensation became the storm center of a dispute over the proper definition of the term *total disability* in the Louisiana Workmen's Compensation Statute.¹ Knispel's counsel showed that his affliction made it dangerous and virtually impossible for him to continue carrying on his work as a lineman and also deprived him of the ability to do structural iron work or to be a radio mechanic or a carpenter — the only allied trades for which he had a demonstrated aptitude. The court observed in passing that the only occupations which were specifically shown to be open to him were those of night watchman or porter; but it seems fair to surmise that most tasks of unskilled labor which could be performed on the ground and demanded no special precision of eyesight were still well within his capacity.

The case required an interpretation of the provision of our compensation act, which defines total disability as "disability to do work of any reasonable character."² Counsel for the defendant employer contended earnestly that work was available to Knispel which was reasonable and would provide an income, although admittedly he would receive less than before the accident and would be required to adjust himself to new conditions. The defendant urged, therefore, that the disability was not total. This contention, however, was dismissed, and the Louisiana Supreme Court laid down a formula for total disability that gave an entirely different meaning to the language of the act. Said the court:

"The disability should, we think be deemed total to do

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1. Knispel v. Gulf States Utilities Co., 174 La. 401, 141 So. 9 (1932).

2. LA. R.S. 23:1221(2) (1950).

work of any reasonable character, within the intendment of the law, whenever it appears that the employee, due to the injury, is unable to perform work of the same or similar description that he is accustomed to perform. When he is unable to perform such character of work, his occupation, due to the injury received in his employer's service, has been taken from him, and he is in the world without an occupation. In his position he is wholly incapacitated, and what little he may learn or be able to do thereafter will likely be done under greater difficulties, placing him at a disadvantage even in securing what work he may be able to perform."³

This definition, which permits a finding of total disability whenever the worker is deprived of his capacity to do work similar in description to that which he was doing at the time of injury has persisted ever since the decision in *Knispel's* case.⁴ It has received the consistent praise of those members of the legal profession who regularly represent claimants, and it has been damned with equal fervor by defendants' counsel. During the twenty-seven years which have elapsed, every decision in which the courts have pondered the *Knispel* formula in some new fact setting has been eagerly scanned by the profession to determine whether there is apparent any slight shifting in the winds of judicial temper.

Our courts of appeal have not always accepted the *Knispel* formula with complete equanimity. In 1949 the Court of Appeal for the Second Circuit was urged to reconsider the entire matter afresh. Although it declined to abandon the rule of the *Knispel* case, yet it observed somewhat sadly that, "if [the matter] were [one] of first impression, we lean strongly to the belief that our opinion would be otherwise than we now feel constrained to render."⁵ Finally, writers have not infrequently characterized the *Knispel* formula as being out of line with the trend of judicial decision in this country.⁶

3. *Knispel v. Gulf States Utilities Co.*, 174 La. 401, 409, 141 So. 9, 12 (1932).

4. MALONE, LOUISIANA WORKMEN'S COMPENSATION LAW AND PRACTICE 277, §§ 273, 274 (1951).

5. *Boling v. Bituminous Casualty Corp.*, 42 So.2d 567, 568 (La. App. 2d Cir. 1949). Janvier, J., of the Orleans Court of Appeal has perhaps more frequently than other appellate judges voiced his feeling of perplexity over the Supreme Court's interpretations of the *Knispel* rule. See, e.g., *McAlister v. Liberty Mutual Ins. Co.*, 87 So.2d 354 (La. App. Orl. 1956).

6. Professor Larson attributes the *Knispel* formula to the fact that "permanent" benefits are limited in Louisiana to 400 weeks and that our disability provision should be regarded in the nature of a schedule-type award. 2 LARSON, THE LAW OF WORKMEN'S COMPENSATION § 57.53 (1952). It is difficult to accept this easy

HISTORY AND DEVELOPMENT OF THE KNISPEL FORMULA

An evaluation of the *Knispel* formula can appropriately begin with a brief consideration as to how the rule emerged and how it came to assume its present form. Louisiana Revised Statutes, Section 23:1221, states that a worker is not totally disabled so long as he can do work of any reasonable character. This would appear to mean that a worker who can still do "reasonable" work is not totally disabled even though he has lost his capacity to perform the same job he performed at the time of injury, so long as he retains an obvious earning capacity in work that is available to him, that he can perform, and that will help bring him a fairly dependable livelihood.

We are slightly handicapped in considering the court's definition of this provision by reason of the fact that there was a peculiar inconsistency in the original Burke-Roberts Act of 1914. According to that statute, if the injury was total in character but appeared to be only temporary in duration, it was described as loss of ability to do work of any *reasonable* character; but if the total disability was permanent, it was described as loss of ability to do work of *any* character.⁷ In other words, the qualifying word *reasonable* was omitted when the total disability was permanent but was included where the disability was only temporary. This was probably due to inadvertence. Temporary total and permanent total disabilities were not listed in direct sequence in the original statute as they are in our present act, but were separated by two printed pages, which probably obscured the inconsistency.

Although this was corrected in 1918,⁸ yet by that time the Supreme Court had had occasion to pass upon the term, permanent total disability to do work of *any* character, as set forth in the 1914 act. This was in the case of *Myers v. Louisiana Railway & Navigation Company*,⁹ which has since become prominent in

explanation in view of the fact that in twenty-one other states compensation for permanent total disability is limited for periods varying from 300 to 500 weeks. Yet only Louisiana and Michigan test total disability according to the scheme described in the text of this article. Furthermore, the tendency in other states to extend compensation for the full period of disability is a comparatively recent development in the statutes, which, incidentally, is continuing at an accelerated pace.

Even Samuel Horovitz, an ardent advocate of liberality toward the compensation claimant regards the use of the *Knispel* rule as less fair than the approach adopted in other states. HOROVITZ, INJURY AND DEATH UNDER WORKMEN'S COMPENSATION LAWS 275 (1944).

7. La. Acts 1914, No. 20, § 8(1).

8. La. Acts 1918, No. 38, § 1.

9. 140 La. 937, 74 So. 256 (1917).

our jurisprudence for the part it played in developing the term "arising out of employment."¹⁰ At the time of the injury the claimant, Myers, was 60 years old. His hip joint was fractured, and one year later, at the time of the trial, he was still unable to go about without crutches. It was determined that he would never be able to do such parts of a carpenter's work as climbing ladders, or much walking around, or even much standing. The court, however, emphasized that there were other lines of work in which he might later manifest an earning capacity. It therefore conceded, with obvious reluctance, that such a worker's disability is not *necessarily* total. Nevertheless, the court managed to affirm the trial judge's award of compensation for total permanent disability. The court justified this action by observing that at the time of trial (a year after the accident) the healing processes were not complete and any earning ability the worker might acquire thereafter was entirely prospective and conjectural. This conclusion was fortified through reference to the fact that Myers' physical capacity to discharge the duties of some other job offered no assurance that other employers would actually hire him in view of his age and physical condition. The importance of this decision, for present purposes, is limited to the fact that the court clearly recognized in *Myers'* case that frequently judges can only venture a bare conjecture as to whether the injured worker may at some future time be able to acquire and hold a remunerative job different in character from the one he held at the time of injury. Any determination that the worker can so do must rest upon speculations as to future conditions of the labor market, upon possibilities relative to the claimant's adaptability and ingenuity, and estimates as to the potential sympathy and understanding of prospective employers. We shall discuss the importance of this observation later. For present purposes it is sufficient to note that the prospect of facing this conjecture at the possible expense of the injured worker is one that has induced courts everywhere to engraft exceptions or qualifications upon the usual formula that a worker is not totally disabled so long as he can do any type of work that will bring him a livelihood. In the *Myers* case our court had seized upon the difficulties and embarrassment that adhere in any effort to administer the commonly accepted definition of total disability and these considerations prompted it to resolve all doubts in favor of the claimant. The *Myers* case is the only decision that dealt with

10. MALONE, LOUISIANA WORKMEN'S COMPENSATION LAW AND PRACTICE §§ 191, 192 (1951).

the original definition of total disability under the 1914 statute. From this point on, the courts were faced with the term "work of *any reasonable* character," pursuant to the 1918 amendment.

The groundwork for the rule in *Knispel's* case was laid in the first decision to define work of a reasonable character. This was *Franklin v. Ernest Roger Company*, decided by the Court of Appeal for the First Circuit in 1925.¹¹ The claimant was a manual worker who had suffered a serious injury to his leg and hip so that he could neither walk, stoop, bend, nor use his leg. A court interpreting almost any conceivable definition of total disability would find that, under these circumstances, Franklin was totally disabled, and the court of appeal so held. However, it is the language of the decision that is of interest here:

"The language 'permanent total disability to do work of any reasonable character during period of disability' in the legislation in question does not mean that the party must be unable to do any kind of work, but means permanent total disability to do work of any reasonable character *that the party knows how to do and is capable of doing, which will afford him a support for himself and family.*"¹² (Emphasis added.)

It is noteworthy that the court could have reached the conclusion that Franklin was totally disabled by merely stating that there is no labor market in which dependable regular employment is available for a man who cannot either walk or stoop. But the court chose to state that reasonable work means work that the party knows how to do and which he is capable of doing. This was perhaps an unnecessary enlargement of the definition of total disability. Once the court has arrived at this point, it is an easy step to the next conclusion, that reasonable work means work for which the injured claimant has a proved aptitude. The final step is equally easy and inviting. In most instances, the claimant has an acknowledged aptitude only for the general type of work in which he was previously employed. At this point, we need not be surprised to discover that we are approaching the rule of the *Knispel* case.

This gradual and almost imperceptible shifting of meaning suggested above is clearly exemplified in the next important case on the subject of total disability, *McQueen v. Union Indem-*

11. 2 La. App. 764 (1925).

12. *Id.* at 766.

nity Company, decided by the Court of Appeal for the First Circuit just one year before the *Knispel* decision.¹³ Here again, the court's conclusion that McQueen was totally disabled is one that would have been reached in any jurisdiction under almost any conceivable formula of total disability. McQueen had suffered a paralysis of the spinal cord, resulting in a condition known as drop foot, in which his leg was an actual impediment, dragging uselessly behind him. He had also lost all ability to control his bowel movements. There probably would have been no contention that he was only partially disabled had it not been for the fact that McQueen's wife operated a gasoline filling station to support the family and he was able to be of some limited assistance in this enterprise. Clearly he would not have been hired by any employer who was not influenced by sympathy or family ties.

Again, as in *Franklin v. Roger Company*, we are interested primarily in the way in which the test of disability was expressed.

"We do not believe," said the court, "that the law ever contemplated that, if the injured employee recovered to the point where he became capable of performing any kind of work of a reasonable character, regardless of its nature, that he was to be deprived of further compensation that was otherwise due him. We are rather of the opinion that it meant that he should be able to perform work that is reasonably of the same kind or character of the one he was accustomed to perform and is capable of doing. It is hardly conceivable that it ever intended that an employee who was a skilled worker in any trade, earning an average weekly wage which entitled him to the maximum compensation of \$20 per week, should be denied that compensation because forsooth there came a time during the period of compensation when he was able to earn \$4 to \$5 per week as a helper around a filling station."¹⁴

The opinion relies strongly upon the *Franklin* case. The last step has been taken. The court points out that the fact that some kind of work, even of a reasonable character, may be available to claimant is not enough to prevent him from being totally disabled within the meaning of the act. For the first time, the particular skilled nature of the victim's trade is emphasized and

13. 136 So. 761 (La. App. 1931).

14. *Id.* at 763.

the court suggests that the loss of the capacity to do the same work is enough to constitute total disability.

From the above observations it seems that our present test of total disability springs from the seed planted in *Franklin v. Roger Company* and was expanded to its full stature in *McQueen v. Union Indemnity Company*. The matter had already been debated and the test was already available for the Supreme Court when that tribunal decided Fred Knispel's case. But it was the *Knispel* decision that crystallized the rule and gave it permanence by imprinting upon it the sanction of the Supreme Court. Without this the rule would probably not have survived, since both the *McQueen* and *Franklin* cases were concerned with serious injuries which could be regarded as totally disabling under almost any rule imaginable, and the statements in these two decisions could have been dismissed later as unnecessary to the determination. It is not clear in either of these cases that the courts of appeal were fully aware that they were innovating; but in the *Knispel* case the Supreme Court deliberately concluded that a skilled lineman need not be a porter, watchman, or common laborer, nor need he learn a new trade, and it carefully explained why it thought this conclusion was proper.

One final observation is necessary to any fair historical perspective of the Louisiana total disability picture. The idea that an employee is totally disabled whenever he cannot perform the normal tasks of a single designated occupation (although he can concededly do other kinds of remunerative work) stands in sharp contrast with Section 23:1221(3) of the Statute, which deals with enumerated losses of designated extremities or organs of the body. These scheduled losses include fingers, toes, hands, arms, feet, legs, and eyes. Provision is made for the payment of disability compensation for a specifically designated number of weeks which is narrowly limited in each instance. Only in the few situations where the victim has suffered the loss of both hands, both feet, both eyes, or the loss of one hand and one foot is he entitled under the schedule to compensation for the full four hundred weeks that would be allowed for total permanent disability. Otherwise the compensation period is much shorter. The loss of one leg, for example, justifies full compensation for only one hundred and seventy-five weeks. So striking a contrast between the scheduled losses and the liberal provision for total disability under the *Knispel* rule could hardly be tolerated within the confines of a single compensation system. Either the sched-

ule must be ignored whenever it conflicts with the disability provision, or the liberal version of disability described above must be reduced to a more modest perspective that would harmonize with the limited allowances for scheduled losses.

The first question, then, to arise is whether the limited compensation provided in the schedule should mark the outside limits of recovery even though the loss suffered by the worker has rendered him totally disabled. It is noteworthy that the specific loss provision does not require in so many words that the compensation provided in the schedule shall be exclusive. The schedule is prefaced only by the statement, "In the following cases the compensation shall be as follows: . . ." Similar language is employed in connection with the scheduled loss provisions in the compensation statutes of other states. Statutory differences make it difficult to pronounce arbitrarily that there is a clear majority position.¹⁵ If any generality is possible, we may venture the observation that in most of the decisions outside Louisiana the courts have adopted the position that the legislature intended that the scheduled provisions should prevail over general disability provisions whenever there is a conflict, and that when a listed loss has occurred without any appreciable effect upon other portions of the body, no inquiry can be made as to its disabling effects.¹⁶

This prevailing attitude that the schedule is exclusive has not escaped criticism even in the jurisdictions where it has been adopted. A fair interpretation of the phrase, "In the following cases the compensation shall be as follows," would seem to require that compensation for the limited number of weeks provided in the schedule should be awarded irrespective of any absence of proof that the victim was in fact disabled.¹⁷ It does not follow, however, that the schedule must be regarded as pro-

15. See Shemel, *Workmen's Compensation Awards for Injuries to Specific Members of the Body*, 30 CORN. L.Q. 218 (1944).

16. *New Amsterdam Casualty Co. v. Brown*, 81 Ga. App. 790, 60 S.E.2d 245 (1950); *Petroleum Casualty Co. v. Seale*, 13 S.W.2d 364 (Tex. Com. App. 1929); *Soukup v. Shores Co.*, 222 Iowa 272, 268 N.W. 598 (1936). Occasionally a statute expressly provides that the schedule is exclusive, i.e., VA. CODE § 65-53 (1950). The same is true in Kansas. See Annot., 129 A.L.R. 663 (1940). As indicated later in note 40 *infra* many statutes, after setting forth the schedule of specific injuries, conclude with a statement to the general effect that in "other cases" disability shall be determined in accordance with the facts. For conflicting interpretations of this type of provision where the exclusive character of the schedule is involved, see Note, 22 IOWA L. REV. 161 (1936).

17. This much is uncontroverted. Where a scheduled injury is sustained, the claimant is entitled to his award even though he has since been regularly employed at wages in excess of those paid before the accident. See cases collected in 2 LARSON, *THE LAW OF WORKMEN'S COMPENSATION* § 58.10, n. 35 (1952).

viding the outside limits of recovery even though the designated specific loss has in fact served to disable the worker totally and permanently. The schedule can be fairly regarded as an aid to the simple administration of the statute, relieving the claimant of the necessity of proving disability for specific losses in order to entitle himself to an award for the limited number of weeks prescribed in the schedule, but leaving open the possibility of establishing a claim for a more extended award whenever the claimant can show that in fact he is permanently and totally disabled. In short, it seems reasonable to contend that there are two parallel benefits provided for certain uncomplicated losses and the rule of liberal construction requires that the claimants be allowed the more favorable benefit. Most writers have favored this view,¹⁸ and it has been adopted in several jurisdictions.¹⁹ Of particular interest is the situation in Michigan where recently the Supreme Court of that state denied the exclusive character of the schedule after having followed the majority position for thirty-seven years.²⁰

Even those courts adhering to the majority view on the exclusive nature of the specific loss provisions have nevertheless sought to avoid the provisions wherever possible. Almost universally the scheduled losses have received a strict and literal interpretation. The loss of a leg under the schedule generally means that there must have been a complete severance unattended by any complications. If the effect of an injury to the leg is to produce disabling pain in other regions of the body, the schedule will likely be ignored and compensation awarded on a disability basis.²¹ Similarly, a leg injury which does not result in loss or surgical amputation of the limb may entitle him to compensation based upon his disability rather than to the arbitrary figure provided in the schedule for loss of a leg.²²

The tendency described above to confine the application of the schedule to cases of complete and uncomplicated loss domi-

18. *Id.* § 58.20.

19. In Massachusetts, Maine, and Rhode Island benefits for schedule losses are in addition to disability benefits. DODD, ADMINISTRATION OF WORKMEN'S COMPENSATION 641 (1936).

20. *Van Dorpel v. Haven-Busch Co.*, 350 Mich. 135, 85 N.W.2d 97 (1957). The interesting opinion by Voelker, J. (*Anatomy of a Murder*) deserves careful reading.

21. See, e.g., *Robinson v. Pitkin Moving Van Co.*, 258 App. Div. 829, 15 N.Y.S.2d 764 (1939). The cases are almost unanimous in this accord. Annot., 156 A.L.R. 1344 (1945). *Johnson v. Anderson*, 217 S.W.2d 939 (Tenn. 1949), noted in 21 TENN. L. REV. 208 (1950).

22. *Ibid.*

nated the earliest Louisiana decisions.²³ In this way our courts were able for a time to avoid committing themselves on the question of the exclusive character of the schedule. The language of these early decisions, however, clearly suggests that the general disability provisions would prevail in the event of a direct conflict with the schedule.²⁴ Then followed a period in the history of our litigation from 1926 until 1932 when the courts, beginning with *James v. Spence and Goldstein, Inc.*,²⁵ appeared to commit themselves to the proposition that the limitations of the schedule mark the outside limits of recovery.²⁶ But this was not for long, for in the same decision in Fred Knispel's case that gave the present definition to total disability the court refused to limit compensation to the loss of one eye as provided in the schedule.²⁷ The resulting confusion in our jurisprudence was finally put to rest in 1935 when the majority opinion of a divided court in *Barr v. Davis Bros. Lumber Co.* announced, ". . . it was not the intention of the legislature to have [the schedule] supersede and take precedence over the disability sections, but rather to supplement them. This conclusion is in harmony with the case of *Knispel v. Gulf States Utilities Co.* . . . and the jurisprudence of this court on the subject and in keeping with a fair and reasonable interpretation of the statute."²⁸ Thus the court succeeded in ridding itself of the limitations of the schedule and left the way clear to administer all disability claims through the generous provisions of the *Knispel* formula.

PRESENT STATE OF THE KNISPEL FORMULA

The various ramifications of the *Knispel* formula have been discussed elsewhere,²⁹ and need not be reconsidered here. It is sufficient to observe that the worker qualifies as being totally

23. *Norwood v. Lake Bisteneau Oil Co.*, 145 La. 823, 83 So. 25 (1919); *O'Donnell v. Fortuna Oil Co.*, 2 La. App. 462 (2d Cir. 1925). For numerous other cases of this period, see MALONE, LOUISIANA WORKMEN'S COMPENSATION LAW AND PRACTICE 348-50 (1951).

24. "If by reason of the fact that there is a total loss of the use of the leg, the case might also fall under [the schedule]. If so, the situation would be that two clauses of the act cover the case at bar. If then we should apply the clause giving the smaller compensation, this would be adopting a liberal construction in favor of the employer. But the jurisprudence is that a construction liberal to the employee should be adopted." *Wilkinson v. Dubach Mill Co.*, 2 La. App. 249, 256 (2d Cir. 1925).

25. 161 La. 1108, 109 So. 917 (1926).

26. See the excellent account of this period of confusion in MAYER, WORKMEN'S COMPENSATION IN LOUISIANA 85-97 (1937).

27. *Knispel v. Gulf States Utilities Co.*, 174 La. 401, 141 So. 9 (1932).

28. 183 La. 1013, 1024, 165 So. 185, 188 (1935).

29. MALONE, LOUISIANA WORKMEN'S COMPENSATION LAW AND PRACTICE §§ 272-277 (1951).

disabled not only when he is wholly incapacitated from doing his former work, but likewise when he is unable to perform certain isolated functions of his earlier job which are deemed substantial parts of that calling.³⁰ Similarly, total disability results where the performance of important functions of the old trade involves pain and suffering to the claimant or danger to himself or his co-workers.³¹

The situation of the unskilled or common laborer has given some difficulty. The tasks assigned to unskilled workers vary considerably from job to job and even from one hour to the next. Hence it would be unfair to conclude that the manual worker is totally disabled if he cannot perform the precise operation in which he was engaged at the time of accident or if he cannot do every act that an employer of manual labor could conceivably order him to do. More flexibility is needed here. To meet this need the Louisiana courts tend to emphasize that the unskilled laborer is not totally disabled so long as he can do work of *reasonably* the same character as that performed prior to accident.³² In other decisions the courts have observed that the unskilled laborer is to be regarded as totally disabled only when he cannot substantially compete for regular employment with able-bodied workers in the flexible market for common labor.³³

THE LOUISIANA DISABILITY FORMULA IN NATIONAL PERSPECTIVE

Writers on workmen's compensation have observed that the *Knispel* formula for determining total disability differs from the test that prevails in all other jurisdictions except, possibly, Michigan.³⁴ And certainly most decisions elsewhere that have

30. *Id.* § 274.

31. *Ibid.*

32. *Wright v. National Surety Corp.*, 221 La. 486, 59 So.2d 695 (1952); *Morgan v. American Bitumuls Co.*, 217 La. 968, 47 So.2d 739 (1950).

33. MALONE, LOUISIANA WORKMEN'S COMPENSATION LAW AND PRACTICE § 275 (1951). See particularly material in 1960 supplement to this work under § 275.

34. *Foley v. Detroit United Railway*, 190 Mich. 507, 514, 157 N.W. 45, 48 (1916). The test currently employed in Michigan was derived by its Supreme Court from an interpretation of § 11(e) of the Michigan Compensation Statute defining the wage basis upon which compensation is computed, and which read in 1916 as follows:

"The weekly loss in wages referred to in this act shall consist of such percentage of the average weekly earnings of the injured employee, computed according to the provisions of this section, as shall fairly represent the proportionate extent of the impairment of his earning capacity *in the employment in which he was working at the time of the accident*, the same to be fixed as of the time of the accident, but to be determined in view of the nature and extent of the injury. . . ." (Emphasis added.)

Although one may well doubt that this provision was intended to do more than

squarely faced the question have announced that a worker is not totally disabled so long as he is capable of earning a livelihood by doing any work of a reasonable character, even though different from the type of work that he was doing at the time of his accident.³⁵ Awards of permanent total disability outside Louisiana constitute an inconsiderable percentage of the total. In New York, for example, which accounts for at least 1/5 of all total disability cases in the country, these represent only about 0.3% of all cases in that state.³⁶

At first blush the picture presented seems to be one of a striking contrast between the Louisiana situation with respect to total disability and the situation prevailing elsewhere throughout the nation. So broad a conclusion, however, may not be entirely justified. It should be noted that numerous considerations, including diversities of statutory approach to total disability in the several states, are involved. There is no uniform legislative approach to the term, total disability, in the various statutes. The compensation acts in one large group of states recognize total disability as a classification entitling the claimant to the maximum compensation available under the act, but the legislatures in these states made no effort to define the term. In most of the statutes in this group there is a provision specifying that certain enumerated losses shall constitute total disability. Usually included are the loss of both legs, both arms, or both eyes.³⁷ A few states further specify that total and permanent paralysis resulting from spinal injury or imbecility induced by cranial injury shall amount to total disability.³⁸ Many of the

establish the contract wage at time of accident as the basis for computing compensation, the Michigan Supreme Court in the *Foley* case, *supra*, held that the compensation must represent the impairment in the claimant's earning capacity with reference to the specific employment in which he was working at the time of accident. This rule persists today with only one modification. The allowable compensation when added to the wages claimant can earn after the accident at a different calling must not exceed the total wage earned prior to the accident, and the estimated excess, if any, is deducted from the amount of compensation to be allowed. MICH. STAT. ANN. § 17.161 (1950); *Lynch v. Briggs Mfg. Co.*, 329 Mich. 168, 45 N.W.2d 20 (1950); *MacDonald v. Great Lakes Steel Corp.*, 268 Mich. 591, 256 N.W. 558 (1934).

35. *Clark v. Henry & Wright Mfg. Co.*, 136 Conn. 514, 72 A.2d 489 (1950). Cases collected in Annot., 149 A.L.R. 432 (1944). 2 LARSON, *THE LAW OF WORKMEN'S COMPENSATION* § 57.53 (1952).

36. SOMERS & SOMERS, *WORKMEN'S COMPENSATION* 60 (1954). The same authors point out that of five representative states studied none paid more than 8% of its cash compensation payments on permanent totals, and three spent less than 2%. *Id.* at 70.

37. Loss of both limbs, arms, or eyes constitutes total disability by the express terms of the statutes in all states except Indiana and North Dakota.

38. ARIZ. CODE ANN. § 56-956(c) (1939); CALIF. LABOR CODE § 4662(d) (1937); CONN. GEN. STAT. § 7430 (1949); HAWAII REV. LAWS § 97-25 (1955); The interesting opinion by Voelker, J. (*Anatomy of Murder*) deserves careful

statutes in this group state expressly that the specific losses in the total disability list are *not* exclusive.³⁹ This intention is sometimes manifested by a statement to the effect that "in other instances total disability shall be determined in accordance with the facts."⁴⁰ Even, however, if no such statement appears in the act (as is frequently the case), the courts have consistently allowed total disability compensation for other serious injuries in addition to those set forth in the statute.⁴¹ The difference between the listed and unlisted instances of total disability lies in the fact that proof that the victim has suffered a loss of the type listed in the statute will entitle him automatically to total disability compensation,⁴² while in all other cases he must afford proof that his injury did in fact totally incapacitate him. However, the significant feature of all the statutes discussed above is that the term, total disability, is wholly undefined by the legislature. One would not be justified in concluding that the listed instances (all of which are of a highly serious character) are even suggestive of the type of injury that can appropriately be regarded as totally disabling, for the listed in-

IDAHO CODE § 72-311 (1947); KAN. GEN. STAT. 44-510 (Supp. 1957); KY. REV. STAT. § 342.095 (1953); MAINE REV. STAT. c. 31, § 11 (1954); MO. STAT. ANN. § 287.200(2) (1939); NEV. REV. STAT. 616.575 (1957); N.H. REV. STAT. ANN. 281.23 (1955); N.C. GEN. STAT. § 97-29 (1958) (total disability resulting from brain and spinal injuries not subject to maximum limitations); S.D. CODE § 64-0403(4) (t) (1939); R.I. GEN. LAWS c. 300, art. II, § 10(c), (f) (1938).

39. HAWAII REV. LAWS § 97-25 (1955); IDAHO CODE § 72-311 (1947); ILL. STAT. ANN. c. 48, § 145(e) (18), (j) (1941); Smith-Hurd, N.H. REV. STAT. ANN. 281:23 (1955); N.M. STAT. ANN. 59-10-18 (1953); S.D. CODE § 64.0403(4) (t) (1939); WIS. STAT. ANN. 102.44(2) (1957).

40. ARIZ. CODE ANN. § 56-956(c) (1939); ARK. STAT. ANN. § 81-1313(a) (1947); CALIF. LABOR CODE § 4662(d) (1937); FLA. STAT. ANN. § 440.15(1.b) (1958); KAN. GEN. STAT. 44-510 (Supp. 1957); MD. CODE ANN. art. 101, § 36(1) (a) (1955); MISS. CODE ANN. § 6998-09(a) (recomp. 1952); MO. STAT. ANN. § 3706(b) (1939); NEV. REV. STAT. 616.575 (1957); N.Y. WORKMEN'S COMPENSATION LAW § 15(i); OKLA. STAT. ANN. 85:22(1) (1951); W. VA. CODE c. 23, § 2531(j) (1955).

41. *Stanley v. Hyman-Michaels Co.*, 222 N.C. 257, 22 S.E.2d 570 (1942).

42. This is expressly provided in California, Missouri, New Hampshire, Rhode Island, and West Virginia. CALIF. LABOR CODE § 4662 (1937); MO. STAT. ANN. § 3706(b) (1939); N.H. REV. STAT. ANN. 281:24 (1955); R.I. GEN. LAWS c. 300, art. II, § 10(c) (f) (1938); W. VA. CODE c. 23, § 2531(j) (1955). The statutes in several states provide that the listed losses shall be regarded as totally disabling in the absence of "proof" (or "conclusive proof") to the contrary. KAN. GEN. STAT. 44-510 (Supp. 1957); MD. ANN. CODE art. 101, § 36(1) (a) (1955); NEV. REV. STAT. 616.575 (1957); N.M. STAT. ANN. 59-10-18 (1953); N.Y. WORKMEN'S COMPENSATION LAW § 15(i); OKLA. STAT. ANN. 85:22(1) (1951). The provision in Utah is unique. When one of the listed losses is suffered an immediate award for total disability shall be made by the commission. In other cases of claimed total disability the commission is restricted to a tentative finding, which does not become final until, after a period of attempted rehabilitation, the Division of Vocational Rehabilitation has certified that the worker has cooperated and cannot be rehabilitated. UTAH CODE ANN. § 35-1-67 (1943), as amended by Utah Laws 1959, c. 58.

juries or losses are those whose incapacitating character need not be established by proof. They thus constitute a unique class from which no meaningful analogy can be drawn. It follows, then, that in this group of states the courts are left with free hands to define total disability as they choose.

Only a small group of four statutes afford even the barest indication of any legislative effort to afford a definition of total disability. Under these statutes total disability is described as a condition that incapacitates the workman from performing "any work at any gainful occupation."⁴³ Yet, despite the implicit suggestion here that the worker must be virtually bedridden in order to qualify as a totally disabled person, some of the most liberal pronouncements by courts on total disability that the writer has discovered emanate from these jurisdictions.⁴⁴ Certainly there is no evidence in the decisions that the statutory language has induced the courts in these states to adopt a more conservative attitude toward total disability than prevails elsewhere.

THE JUDICIAL DEFINITION OF TOTAL DISABILITY

It would seem to follow, then, that however total disability is to be defined, the definition must come from the judiciary in each of the several states. The prevailing attitude of the courts, as pointed out earlier, is that a worker is not totally disabled so long as he can perform work that is reasonably suitable to his capacity, even though it is different in character from what he was doing at the time of the accident. But we cannot appraise the significance of this point of difference between the judicial approach adopted generally and the one that prevails in Louisiana without a consideration of several factors that have an important bearing upon the comparison.

First, it should be noted that the controlling presence of the statutory overall limitation on weekly payments found in virtually all the acts⁴⁵ may serve to attenuate any distinction be-

43. ALA. CODE 26:279(E) (1940); TENN. CODE ANN. 50:1007(e) (1955); WASH. REV. STAT. ANN. § 7679(b) (Remington 1931); WYO. STAT. 27:85 (1957).

To this list must be added, of course, the definition of total disability in Louisiana — "disability to do work of any reasonable character." LA. R.S. 23:1221(2) (1950).

44. See, e.g., *Plumlee v. Maryland Cas. Co.*, 184 Tenn. 497, 201 S.W.2d 664 (1947); *Kuhnle v. Department of Labor and Industries*, 12 Wash.2d 191, 120 P.2d 1003 (1942); *Big Horn County v. Iles*, 56 Wyo. 443, 110 P.2d 826 (1941).

45. The overall maximum limitations on weekly payments for permanent total disability vary, with a few exceptions, from thirty dollars to a little over fifty

tween total and partial disability whenever the wage earned prior to accident is substantial and the percentage of partial disability is relatively high. One illustration will suffice: Assume that an injury takes place in a state whose compensation statute awards sixty-five percent of weekly wages for total disability and imposes a thirty-five dollar maximum upon all weekly compensation payments. If a worker who was earning \$100 per week were totally disabled, he would be entitled to \$65.00 weekly except that the maximum overall limitation would cut down his entitlement arbitrarily to \$35.00 per week. In view of this, how should a court compute the weekly compensation for a worker who was earning the same amount at time of accident but who suffered a disability that is fixed at only sixty percent of total? Should he be allowed sixty percent of \$65.00 (subject, ultimately, of course, to the overall limitation of \$35.00 per week), or should he have only sixty percent of \$35.00 (the total amount that a wholly disabled worker could receive)? If the former approach is used, the partially disabled worker will get \$39.00, which must be reduced to \$35.00 in order to comply with the overall limitation. In short, under this approach he would receive the same amount as a totally disabled worker. If, however, the overall limitation of \$35.00 is accepted as the basis upon which the sixty percent disability is to be computed, the same worker would receive only \$21.00 — \$14.00 less than would be his entitlement under the first computation suggested above.

It might appear at first impression that this latter approach is to be preferred in order to avoid a discrimination against the totally disabled worker in favor of one who is only partially disabled. However, upon further reflection it is apparent that no real discrimination is involved unless the result is either that funds otherwise available for payment to the totally disabled employee's claim are used to pay the claim of the partially disabled worker, or that the totally disabled worker is subject to some arbitrary limitation not imposed upon the one who is only partially disabled. Neither of these two aspects of discrimination would be encountered as a result of computing the partially disabled worker's percentage entitlement upon the basis of sixty-five percent of his earnings prior to accident. Both the totally disabled worker and the one who is only partially disabled are subject to the same ultimate limitation of \$35.00 weekly. This limitation applies to both indiscriminately. Furthermore, the situation of the totally disabled worker would not be bettered in

any way by reason of the use of one method rather than another in computing the percentage award to the partially disabled employee. The overall limitation is imposed by the statute for the benefit solely of the employer, who is guaranteed that in no event will he be called upon to pay more than \$35.00 weekly for any single employee injury. This protection will continue to be afforded him so long as neither the totally disabled claimant nor the partially disabled claimant can secure more than that amount weekly. The \$35.00 maximum is a limitation on the final weekly compensation, and is not a basis or formula for computing compensation. This interpretation prevails in several jurisdictions,⁴⁶ including Louisiana.⁴⁷

TOTAL DISABILITY AND JUDICIAL SPECULATION

A second consideration must be borne in mind in attempting to appraise any difference between the Louisiana version of total disability and the version in other jurisdictions. We have already observed that any determination by court or commission as to the extent of a disability can be no more than a mere conjecture as to a future state of affairs.⁴⁸ The trier is obliged to make an advance estimate of the earning capacity of an injured human being for a period of time that extends into the future. Consider the number of imponderables that cannot be resolved because the trier cannot know what is going to take place after he has handed down his judgment. Even the data relative to the injured worker's physical condition rests largely on conjecture: Consider the medical estimates as to the seriousness of the injury, the tenuous evaluations of the effect of the physical loss upon the performance of the mechanical operations required in a given job, the uncertainty of the medical prognosis concerning prospective improvement or deterioration of the worker's condition. Often the best intentioned expert can only hazard a guess on any or all of these matters.

dollars. Thirty-five dollars appears to be about average. See UNITED STATES CHAMBER OF COMMERCE, ANALYSIS OF WORKMEN'S COMPENSATION LAWS 16 (1958).

46. *Texas Employers' Ins. Ass'n v. Holmes*, 145 Tex. 158, 196 S.W.2d 390 (1946) (interesting discussion). Note, 25 TEX. L. REV. 183 (1946).

47. *Hall v. Pipeline Service Corp.*, 233 La. 821, 98 So.2d 202 (1957) (partial loss of use of foot set at 17.5% of \$35.00 maximum); *Evans v. Louisiana State Board of Education*, 85 So.2d 669 (La. App. 1st Cir. 1956) (scheduled loss, based upon 32 1/2% of 65% of wages, rather than upon 32 1/2% of \$30.00 maximum); *Bean v. Higgins, Inc.*, 78 So.2d 245 (La. App. Orl. 1955) (partial disability); MALONE, LOUISIANA WORKMEN'S COMPENSATION LAW AND PRACTICE § 287 (Supp. 1960).

48. See page 489 *supra*.

Even more problematical are the human and economic factors involved in a determination as to the extent of the disability. The term "disability" is not merely a description of the physical condition of the injured worker except in a very few jurisdictions. It is true, of course, that resort to the table of specific listed injuries results in a purely mechanical decision as to the compensation to be awarded. But we have seen that courts seek earnestly to circumvent the list wherever possible.⁴⁹ The reason for this is fairly obvious. The scheduled award is arbitrary and fails to take into serious account the real purpose of compensation — the repairing of the victim's loss of ability to earn a living in an industrial world which is governed largely by the laws of economics and which is influenced by chance and by the peculiarities of human behavior. The potential operation of these human and economic factors is almost impossible to predict with any assurance, yet they cannot be ignored without serious distortion of the entire compensation scheme. Only a few of the imponderables of this kind need be suggested here.

First is the instability of the industrial economy. The handicapped worker may encounter no difficulty in securing employment so long as times are good and the number of jobs equals or exceeds the available number of workers. But during a period of slack employment the one-armed worker or the employee who complains of a stiff back will probably be among the first to be laid off. Exposure to the uncertainties of the climate of the economy presents an even greater hazard where the injured employee has been obliged to change the nature of his work. By entering a strange field of endeavor he may be forced to compete under the additional handicap of inexperience. Perhaps at one time labor was a fairly adjustable force. But in this modern day of specialized skills and crafts and of seniority privileges conferred by organized labor the inexperienced newcomer is at a severe disadvantage both in gaining employment and in retaining it. The worker who has always labored with his hands may, after sustaining injury, experience for a time little trouble in selling insurance or even in operating a small restaurant or similar enterprise of his own. The initial sympathy of fellow workers and acquaintances added to a favorable but possibly temporary prosperity may bring success for a while. But can one predict with any assurance that this will continue? A sympathetic employer may maintain a faithful shop man in some make-

49. See page 494 *supra*.

shift job as watchman or janitor for a while, but should a humane judge or commissioner seize upon this undependable manifestation of human compassion as a reason for denying full compensation? Again, the adaptability and fortitude of the worker may indicate a promise that he can by sheer grit secure a job in some new field. But should a court or commission confer upon the employer a vested interest in the prospect that such heroism will continue indefinitely to produce a livelihood? Discouragement and human instability play a role here that cannot be ignored.

FOR WHOSE ADVANTAGE SHOULD THE COURT SPECULATE?

It is obvious that the employer as well as the employee has a stake in the incertitude that attends the making of an advance estimate on the extent of disability. But an overly optimistic speculation by the trier that the worker retains a substantial earning power, which later turns out to be mistaken, will likely result in a personal tragedy for the victim and will afford dramatic evidence of a failure to attain the beneficent purposes of compensation. The consequences of an error resulting from an opposite attitude, unduly favorable toward the employee, on the other hand, are not so obvious. For the cost of a mistake in this direction will be spread in dilution through insurance throughout the entire society of consumers and patrons. Courts are not unaffected by the prevailing sentiment that compensation benefits at best are hardly adequate. For this reason the resulting hardship on employers and insurers is at least less visible.

Furthermore, the form of the compensation judgment affords a safeguard that is more readily available to the employer and his insurer than to the employee. Compensation is generally awarded only for the duration of disability. In theory, at least, then, there is a later opportunity to make an adjustment and rectify mistakes in any initial estimate that unduly favors the employee. On the other hand the employee, in Louisiana at least, is denied access to any mechanism for the correction of an original erroneous estimate as to the extent of his disability. The judgment can be modified only if there is a later change in the *physical* condition of the worker. When, therefore, a court is called upon to fix the extent of disability it does so realizing that any error in the estimate that would operate to the prospective disadvantage of the employee is a mistake that is virtually irreparable.

THE "ODD LOTS" DOCTRINE

It is to be expected, therefore, that courts and commissions everywhere will approach the task of evaluating a worker's disability with an appreciation of the uncertainties involved and that they will be inclined to so shape their definition of disability as to lessen somewhat the chance that the worker will suffer thereafter because of the uncertainty of medical estimates or from any unpredictable changes in the economy or from the caprices of human nature. This is best demonstrated in jurisdictions outside Louisiana by the emergence of what has come to be known as the "Odd Lots" doctrine. This idea, which has been sanctioned in one way or another under virtually all the statutes, was first stated in the much-quoted opinion of Judge Moulton in *Cardiff Corporation v. Hall*.

Judge Moulton observed:

"[T]here are cases in which the onus of shewing that suitable work can in fact be obtained does fall upon the employer who claims that the incapacity of the workman is only partial. If the accident has left the workman so injured that he is incapable of becoming an ordinary workman of average capacity in any well known branch of the labour market — if in other words the capacities for work left to him fit him only for special uses and do not, so to speak, make his powers of labour a merchantable article in some of the well known lines of the labour market, I think it is incumbent upon the employer to show that such special employment can in fact be obtained by him. If I might be allowed to use such an undignified phrase, I should say that if the accident leaves the workman's labour in the position of an 'odd lot' in the labour market, the employer must shew that a customer can be found who will take it. . . ."⁵⁰

This same "Odd Lots" doctrine was restated by Judge Cardozo in his usual pungent language:

"He [plaintiff] was an unskilled or common laborer. He coupled his request for employment with notice that the labor must be light. The applicant imposing such conditions is quickly put aside for more versatile competitors. Business has little patience with the suitor for ease and favor. He is the 'odd lot' man, the 'nondescript in the labor market.' Work,

50. *Cardiff Corp. v. Hall*, [1911] 1 K.B. 1009, 1020, 1021.

if he gets it, is likely to be casual and intermittent. . . . Rebuff, if suffered, might reasonably be ascribed to the narrow opportunities that await the sick and halt."⁵¹

It is apparent from what has been said above that the worker's claim to total disability compensation will not be denied in other jurisdictions merely because it appears plausible that he may be able on occasions to secure employment in work of some kind, although different from that which he did before the accident. Some assurance must be forthcoming that he can secure and retain fairly regular employment in such a job in competition with able bodied workers, without reference to sympathy or the fortuity of a lush market for labor.⁵² Even a showing that after the accident the worker was in fact employed in another capacity (and even that he was so engaged at the time of trial) does not establish per se that his disability is not total. Post-injury earnings, even though equal to or greater than those received before the accident, may be due to an inordinately high demand for labor, longer working hours, or other evidence of greater exertion, sympathy, or even pure chance.⁵³ Conversely, it is true that the fact that an employee has failed to secure work since his accident does not conclusively establish that he cannot earn a livelihood in work of a reasonable character.

When the general attitude toward disability is thus examined, the difference between the Louisiana position and the attitude prevailing elsewhere does not appear as striking as it did upon first examination. It is apparent that under the "Odd Lots" doctrine the fact that the employee must seek employment of a kind different from that in which he was previously engaged will have an important bearing on the question of the likelihood that he will be able to retain his new job in the face of vigorous competition with able-bodied workers without allowance for sympathy or favorable employment conditions. The chief distinction for the Louisiana position lies in the effect to be given to the foreign character of the new employment which is claimed to be available to the injured worker. The fact that the new work is "substantially" different from the old job is *conclusive* in favor of a finding of total disability in this state. In other jurisdictions the fact that the worker must adjust to a different job is

51. *Jordan v. Decorative Co.*, 230 N.Y. 522, 525, 130 N.E. 634, 635 (1921).

52. The cases are collected and discussed in 2 LARSON, WORKMEN'S COMPENSATION §§ 57.31, .32, .33, .34, .35 (1952).

53. *Ibid.*

likewise a matter of substantive importance. Its effect, however, is only relative, rather than conclusive. Even this distinction is attenuated in Louisiana in the case of the common laborer, who may be regarded as only partially disabled so long as he can compete on substantially equal terms with other suitors for employment in the broad and diversified market for common labor.⁵⁴ This type of worker receives about the same treatment in Louisiana that would be accorded him elsewhere.

DEFICIENCIES OF THE KNISPEN FORMULA

However, even though the contrast between the Louisiana approach to total disability and the general approach is probably not as sharp as may appear on first impression, yet the distinction is a very real one, and our local rule exerts a marked effect upon the results of compensation litigation in this state. From the standpoint of a sound and fair administration, the Louisiana definition is subject to severe criticism. Because of its controlling presence the judge is denied much of the power he otherwise would possess to individualize each controversy and to determine whether under the particular facts involved the worker still shows substantial promise of having the capacity to provide a dependable livelihood for himself and his family in a calling which, although different from his old job, is nevertheless fairly suitable to his abilities. The fact that the benefit of the *Knispel* rule is available only to the skilled or semi-skilled worker heightens an impression, already implicit in the rule itself, that human dignity is offended when a skilled employee is obliged to undertake work that is less elevated than that which he has been accustomed to perform. It is doubtful that considerations of this kind should play a role of any importance in the administration of social legislation. There is probably a sound basis for the common complaint of employers that the application of the *Knispel* rule encourages indolence and hampers the rehabilitation of the handicapped labor force in this state. Certainly there can be little doubt that the prevalence of the disability rule of Louisiana exerts a marked effect upon our insurance premium rate. If it can be assumed that the overall amount now available for the payment of compensation claims is adequate and proper, this fund would be better distributed if benefits were increased by

54. *Brannon v. Zurich General Accident & Liability Assurance Co.*, 224 La. 161, 69 So.2d 1 (1953); *Morgan v. American Bitumuls Co.*, 217 La. 968, 47 So.2d 739 (1950); MALONE, LOUISIANA WORKMEN'S COMPENSATION LAW AND PRACTICE § 275 (Supp. 1960).

lengthening the period of payment beyond the present four hundred weeks for those who cannot secure employment in any work whatsoever of a reasonable character. It can be plausibly argued that the arbitrary character of the *Knispel* rule encourages a large number of nuisance claims which are settled by compromise and thus has the effect of frittering away the pool of funds that should be available for the beneficent purposes envisaged by the statute.

THE KNISPEL FORMULA — SYMPTOM OF A DEEPER MALADY

A review of these obvious infirmities of the *Knispel* rule may appear to suggest that the Louisiana courts would be well advised to adopt the general position that the worker should not be regarded arbitrarily as totally disabled merely because he has lost the ability to do the same work he performed prior to the accident, and that the ends of justice in this state would be better served by adopting the more flexible "Odd Lots" doctrine that prevails in other jurisdictions. We cannot accept this conclusion, however, without adverting again to the compelling reasons of administration that prompted the adoption both of the *Knispel* rule in this state and of the "Odd Lots" doctrine in other jurisdictions.

These two devices emerged alike because of an aversion of the judge or commissioner to make a present speculation at the possible expense of the worker concerning his future ability to earn a livelihood. Both approaches encourage a resolution of doubt in his favor, and neither of them would be necessary if it were not for the fact that a judgment operating entirely in prospect must be pronounced. If it were possible to administer workmen's compensation through a series of independent weekly determinations on disability (somewhat similar to the procedures employed for the payment of unemployment benefits), equitable results could be achieved with fairly definite rules that would afford complete protection for the interests of the employer as well as those of the employee. Since the compensation judgment must be formulated in advance, it is not difficult to appreciate that the extent of the latitude that will be demanded by the trier for the protection of the worker will be greatly influenced by the extent to which the initial judgment he is required to pronounce must be regarded by him as final and impervious to any later correction. A judge, for example, would probably not hesitate to classify as only partially disabled an injured worker who has since shown

promise of learning a livelihood by operating a small restaurant or other enterprise if the same judge could feel fairly assured that in the event that, contrary to his expectation, the enterprise should later fail he could re-examine his initial finding and make a new evaluation that would accommodate such subsequent disclosures. If, on the other hand, the judge were faced with the awareness that his estimate of partial disability was conclusive and that no later adjustment would be possible, he would in all probability retreat from the prospect of exposing the worker to a risk of impoverishment because of a mistaken guess. This habit of reluctance to speculate will eventually find expression as a formalized test of disability that would favor greatly the prospect of the worker.

The foregoing suggests, to this writer at least, that the appropriateness of any formula for disability must be determined in light of the flexibility, or lack of flexibility, of the administrative machinery for the handling of compensation controversies. A disability formula strongly favoring the prospect of the worker is to be expected in a state whose compensation statute fails to envisage any opportunity for a correction of the results of a mistaken estimate as to the seriousness of the disability, while a formula that invites a personalized judgment with greater leeway for the protection of the employer and insurer will likely be forthcoming under a statute that contemplates a continuous supervision by the court and provides adequate machinery for this purpose.

When the matter is so viewed, we may justifiably entertain the suspicion that our *Knispel* formula is merely symptomatic of a more basic shortcoming in our Louisiana compensation statute, and that the formula itself is the result of a well-considered determination on the part of our court to evolve an approach to disability that will serve somewhat as a counterfoil to the rigidity of the administrative machinery established by our antiquated compensation statute. We may therefore profitably compare in outline the Louisiana administration with the procedures available elsewhere for supervising the compensation award and adjusting it to possible changing conditions in the situation of the worker that may occur thereafter.

An adequate supervision of the compensation judgment envisages, first, a continuing award, payable on a weekly or other periodic basis. The prevalence of a practice of commuting the

judgment to a lump sum payment or of encouraging unlimited compromise serves to deprive the court of its supervisory power. Second, a supervision of the judgment requires adequate machinery for the reopening of the award whenever it can be demonstrated that some basic estimate upon which the judgment was predicated has since proved itself to be shortsighted in the light of later developments.

The rigid inflexible character of the Louisiana practice in both the above respects is apparent. Although the statute expressly contemplates weekly payments during the period of disability, yet every experienced compensation attorney in this state knows that in virtually every instance the compensation obligation is discharged in one way or another by a single lump sum payment. Such a final discharge can be achieved either by commutation of the judgment or as the result of a compromise agreement approved by the court, as authorized by R.S. 23:1273. Although the practice of commuting the compensation judgment to a lump sum under R.S. 23:1274 is disfavored in practice (because of the penalty for excessive discount),⁵⁵ yet it is noteworthy that if the parties are both willing to take and receive a lump sum under this provision and if they comply with the formal requirements of the statute, the court is without power to insist that payments be made on a continuous weekly basis.⁵⁶ This absence of judicial power to exercise control over the making of lump sum payments in Louisiana marks a substantial deviation from the situation that prevails in most of the states. Although the practice varies from jurisdiction to jurisdiction, yet nearly everywhere the court or commission is vested with discretion to refuse any request for commutation whenever it feels that periodic payments would serve the best interests of the worker. Some statutes expressly admonish the trier to refuse commutation except under very special circumstances. The New

55. LA. R.S. 23:1274 (1950). The second paragraph is as follows: "If the lump sum settlement is made without the approval of the court, or at a discount greater than eight per centum per annum, even if approved by the court, the employer shall be liable for compensation at one and one-half times the rate fixed by this Chapter, and the claimant shall, at all times within two years after date of the payment of the lump sum settlement and notwithstanding any other provisions of this Chapter, be entitled to demand and receive in a lump sum from the employer such additional payment as together with the amount already paid will aggregate one and one-half times the compensation which would have been due but for such lump sum settlement. . . ." See *Fluitt v. New Orleans T. & M. Ry.*, 187 La. 87, 174 So. 163 (1937); *Reid v. J. P. Florio & Co.*, 172 So. 572 (La. App. Orl. 1937).

56. Agreement by the parties plus approval by the court "as reasonably complying with the provisions of this [act]" are the only requirements. LA. R.S. 23:1274 (1950).

Jersey provision is typical for this group of states.⁵⁷ Even where the terms of the statute merely vest the judge or commission with discretion to allow or refuse commutation as the best interest of the parties may appear, the allowance of a single lump sum payment is in general disfavor with those who administer the statutes.

"The fundamental purpose of the Workmen's Compensation act is to recompense, partially, the workman for his loss of earnings or earning power by reason of the injuries suffered, arising out of and in the course of his employment. In the event that the death of the wage earner follows as a result of the accidental injuries, the purpose of the act is to furnish to his dependents a fund, payable in installments, similar to and in lieu of the weekly pay check and to recompense in part such dependents for the loss of the benefit of the earnings of the wage earner. It is of primary importance that this fund be safeguarded, so that the purpose of the act — namely, the care and support of those dependents — may be accomplished. This is to the interest of the dependents as well as the public. The public ultimately pays such benefits by reason of the increased operating costs of the employer's business imposed upon him by the statute. If the compensation, or any part thereof, should be paid in a lump sum, neither the Industrial Commission nor the courts could protect the fund. It might be lost by unwise investments or be squandered and thereby the dependents become objects of charity and an additional burden upon the public. The very object of the statute would thereby be thwarted. The allowance of a lump sum award is the exception and not the rule. . . . It follows, therefore, as a matter of public policy, that the welfare of the workman or his dependents is best served by the payment of the compensation in regular fixed installments as wages are paid."⁵⁸

57. "In determining whether commutation will be for the best interest of the employee or the dependents of the deceased employee, or that it will avoid undue expense or undue hardship to either party, the bureau and the County Court will regard the intention of this chapter that compensation payments are in lieu of wages, and are to be received by the injured employee or his dependents in the same manner in which wages are ordinarily paid. Commutation is to be allowed only when it clearly appears that an unusual circumstance warrants a departure from the normal manner of payment and not to enable the injured employee or dependents of a deceased employee to satisfy a debt, or to make payment to physicians, lawyers or others." N.J. STAT. ANN. 34:15-25 (1939).

58. *Illinois Zinc Co. v. Industrial Commission*, 355 Ill. 253, 256, 189 N.E. 310, 311 (1934). For an excellent discussion of lump sum settlements, see DODD, ADMINISTRATION OF WORKMEN'S COMPENSATION 719 *et seq.* (1936). For further

COMPROMISE

One of the most serious problems that must be faced in the administration of compensation concerns the permissible latitude for compromise agreements. Where a voluntary adjustment of differences is readily tolerated or even encouraged there is no remaining opportunity for the court to revise or correct the award. At this point care must be taken to distinguish the compromise settlement and the policies that underlie it from the court's exercise of its power to commute a compensation award to a lump sum. In the latter instance there is no dispute concerning the existence of the claim or the amount to which the worker is entitled. The only issue that the court must face is the desirability of a single lump sum payment in final discharge of the obligation as opposed to periodic payments. With reference to the compromise, on the other hand, serious policy questions arise. These are public considerations favoring prompt settlement and the making of funds immediately available for the relief of the destitute worker. These would tend to commend a liberal attitude toward the right of the parties to make an amicable settlement of their dispute. But the persuasive effect of these considerations cannot be viewed merely from an abstract point of view. Where the established procedure for adjudication involves the prospect of protracted litigation, the urge to accept some voluntary settlement device that would put a prompt end to the controversy will be more impelling than would be the case in a jurisdiction where there prevails a requirement of prompt notice of accident to a commission, which then assumes automatic control of the situation, requires full details from both parties and exacts progress reports on the payment of medical expenses and disability allotments. Where, as in Louisiana, the compensation scheme must shift for itself and the compensation dispute assumes every aspect of ordinary litigation, the invitation to compromise is almost irresistible, and the urge to oppose the hope of gain against the risk of loss has a stronger policy justification. Whenever the compensation dispute tends to be regarded as just another piece of litigation, we must expect the settlement practices that are typical of personal injury claims in general. It is not surprising, therefore, that although the practice of compromising is fairly familiar under most compensation statutes, yet the writer has been unable to discover any other jurisdiction where compromise is the almost universal procedure for disposing of serious claims that it is in Louisiana.

In addition to the strictly litigious character of the method for obtaining an award in this state, another factor contributes substantially to the wider use of the compromise here than elsewhere. We have already observed that the statutes have generally been so interpreted as to give exclusive effect to the schedule of specific losses of members of the body. Since the majority of claims fall within this classification they are subject to a fairly rigid mechanical evaluation and they bear a fixed price tag. Hence there is usually little reason for bartering between the parties based upon differences between them concerning the extent and duration of disability. Most statutes, in fact, have been interpreted to prohibit compromise entirely where it would result in a payment of less than the specific benefit provided by law for a scheduled loss.⁵⁹

Furthermore, even a brief survey of the prevalence of compromise on the national scene must take into consideration the fact that in those states which operate under an exclusive state fund the compromise assumes a character entirely different from that with which we are familiar in Louisiana. Informal agreements in these states take the form of a settlement between a representative of the commission itself and the claimant or his attorney.⁶⁰ Since the commission is vested with responsibility for carrying out the purpose of the statute and is not motivated solely by the object of effecting as great a saving as possible for the fund, the usual characteristics of a haggling between adversaries is not prominent. It is noteworthy that in these jurisdictions, particularly, the amicable settlement between claimant and commission can be reopened upon a satisfactory showing of mistake or change of conditions.⁶¹

Finally, it should be noted that any attempt to compromise as to the existence of compensation liability itself is frowned upon in many jurisdictions.⁶² The reasons for this attitude are persuasive. Workmen's compensation payments are geared to a social philosophy of providing a minimum subsistence for the injured worker and his family. Under the compensation scheme itself the permissible amount of the award has been scaled down so

and vigorous criticism of the lump sum practice see SOMERS & SOMERS, *WORKMEN'S COMPENSATION* 159 *et seq.* (1954).

59. 2 LARSON, *WORKMEN'S COMPENSATION LAW* § 82.31, .32 (1952).

60. See Wollett, *The Board of Industrial Insurance Appeals After Nine Years: A Partial Evaluation*, 33 WASH. L. REV. 80, 89-90 (1958).

61. 2 LARSON, *WORKMEN'S COMPENSATION LAW* § 81.40 (1952).

62. See, e.g., *Nagy v. Ford Motor Co.*, 6 N.J. 341, 78 A.2d 709 (1951).

as to meet only bare necessities. A further reduction by compromise could serve to thrust upon the public (which, in the final analysis, finances the compensation scheme) the additional cost of supporting the destitute worker through taxes or charity. In this respect administration of compensation differs sharply from ordinary torts litigation where the personal wishes of the parties are paramount and the public interest in avoiding litigation is clear.⁶³

Although no observer would suggest that compromise practice is peculiar to Louisiana, or that other states are free from problems that arise from the voluntary settlement, yet the important fact remains that because of the almost universal employment of compromise in this state the Louisiana courts, in framing a definition of disability, must act with full awareness that the law they make will exert its greatest effect — not in the courtroom in future litigation — but in the course of the everyday practices of compromise. A truly practical and effective definition of disability must be one that is serviceable at the bargaining table, for this is where it will be most used. The definition of total disability must be so framed as to equalize as much as possible the trading powers of the parties and to offset to some extent the natural advantage enjoyed by the employer or his insurer. The definition must be devised with conscious recognition of the prospect that whatever conclusion is arrived at between the contestants will be translated into a final lump sum payment and that an award based upon such an agreement cannot thereafter be reexamined for any cause except fraud or imposition.

The course of the decisions in Louisiana leaves little doubt that the Supreme Court has manifested serious concern over the almost universal prevalence of compromise in this state and over the tendency of this practice to deprive the courts of their power to so administer the act as to guarantee to the worker at least the minimal benefits envisioned by the compensation scheme.

The original section of the statute authorizing compromises failed to specify the types of controversies that could be conclusively settled. Prior to 1942, however, it was generally assumed that a dispute of any nature whatsoever could be placed at rest by an amicable agreement entered into by the parties and approved by the court as to its general fairness. Compromises re-

63. 2 LARSON, *WORKMEN'S COMPENSATION LAW* § 82.41 (1952); SOMERS & SOMERS, *WORKMEN'S COMPENSATION* 161 (1954).

lating to the extent and duration of disability had been approved with consistency by the courts of appeal.⁶⁴ Any expectation, however, even at that time, that the same position would be sanctioned by the Supreme Court rested on less sure foundations. In only two decisions had the court of last resort considered the validity of compromise agreements. The first of these, *Musick v. Central Carbon Company*,⁶⁵ decided in 1928, approved the compromise of a dispute concerning solely the causal relation between the accident and the employee's death that followed. The amount to which Musick's dependents would be entitled, if any, was not questionable. The other decision, *Young v. Glynn*,⁶⁶ handed down two years later, clearly lent some support to the assumption that all bona fide disputes whatever fall within the compromise provision. Young had sustained an injury to his leg which was apparently being restored at the time of entering into a compromise agreement, which was based upon doubts concerning the period required for recuperation. Thus the probable duration of disability was in question. The court affirmed the finality of the compromise. It observed that the statute "expressly authorizes the parties to settle the matter of compensation between themselves, with the approval of the judge."⁶⁷ But it is significant that the only issue expressly raised by the claimant was that the agreement was procured by fraud and misrepresentation of the employer. The facts failed to support this contention. For this reason the *Young* case was distinguishable when the Supreme Court later determined to invalidate compromises based on disputes of this kind. The turning point came with the case of *Puchner v. Employer's Liability Assurance Corporation*⁶⁸ in 1942. The court announced in unequivocal language that Section 17 of the act, as it then stood, should be construed merely as an ancillary to the provision for lump sum settlements, and it even made the broad observation that no compromise whatsoever was authorized under the act if it purported to discharge the employer's obligation by the payment of a sum less than the full amount of compensation to which the worker may ultimately be found to be entitled when discounted at a rate of not more than eight percent, as authorized by the provision relative to commutation of

64. *Forrestal v. McCray Refrigerator Sales Corp.*, 196 So. 516 (La. App. Orl. 1940); *Young v. A. Marx & Son, Inc.*, 189 So. 167 (La. App. Orl. 1939); *Self v. Wyatt Lbr. Co.*, 189 So. 327 (La. App. 2d Cir. 1939); *Bradford v. New Amsterdam Cas. Co.*, 190 So. 210 (La. App. 2d Cir. 1939).

65. 166 La. 355, 117 So. 277 (1928).

66. 171 La. 371, 131 So. 51 (1930).

67. *Ibid.*

68. 198 La. 921, 5 So.2d 288 (1941).

judgments. However, the opinion also suggested that the court would uphold a compromise based upon a dispute as to whether the act was applicable at all to the circumstances presented. It is clear that the court in the *Puchner* case was striking chiefly at compromises based upon speculation concerning the seriousness of the disability or its probable duration. The opinion in the *Puchner* case made clear the court's conviction that compromise practice on the duration and extent of disability is in sharp derogation of the entire scheme of workmen's compensation:

"[I]n our opinion it would be in direct violation of the letter and spirit of the act to sanction speculation with respect to the duration of an employee's disability, for the primary object of the act 'was to provide an employee whose wages were discontinued as a result of an injury sustained while serving his master, with funds to subsist on until he could return to work.' . . .

"To permit speculation on the duration of an employee's disability would defeat the very purpose of the act. It is to be borne in mind that not only the interests of the employee and employer is involved, but also the interest and general welfare of the public."⁶⁹

Following the *Puchner* decision, the courts of appeal began invalidating all compromises concerning the seriousness and duration of the disability.⁷⁰ This was not for long, however, because in the next session of the legislature in 1942, Section 17 of the statute [R.S. 23:1271] was amended so as to validate all compromises as to "the existence, nature, extent or duration of the injury or disability . . . or any other matter or thing affecting the right of the employee."⁷¹

Thereafter, following this enactment the court was obliged to bow to the legislative will, and large scale settlement of compensation claims was resumed. But there is no reason to suppose that the court's previously expressed aversion to compromise with reference to the extent and duration of disability came to an end merely because the legislature had given unlimited sanc-

69. *Id.* at 935, 945, 946, 5 So.2d at 292, 293, 296.

70. *Scott v. Caddo Parish School Board*, 6 So.2d 806 (La. App. 2d Cir. 1942) (*Puchner* case followed reluctantly); *Stewart v. Brown Paper Mill Co.*, 11 So.2d 627 (La. App. 2d Cir. 1942); *Langston v. Hanbury*, 11 So.2d 415 (La. App. 2d Cir. 1942); *Craig v. Compressed Industrial Cases, Inc.*, 7 So.2d 197 (La. App. 2d Cir. 1941) (*Puchner* case followed and approved).

71. La. Acts 1942, No. 96.

tion to the practice of compromise. Although the court was now powerless to prevent the settlement of compensation disputes through a process based upon private speculation, yet it still retained the means of so weighting the basic disability formula as to reduce to a minimum all chance that the injured employee would be victimized by the uncertainties that make compromise possible or by any inequality of bargaining power between the parties. This has been the effect achieved by a faithful adherence to the *Knispel* rule by the Louisiana courts. One is tempted to wonder whether this rule would have withstood the continuous attacks leveled at it during the past decade if the court had succeeded in its effort in the *Puchner* case to sharply limit compromise practice in this state and had thus been able to assure the victim that the extent and duration of his disability would at least be determined through the impartial operation of the judicial process rather than through the haggling and swapping of private bargaining.

MODIFICATION OF THE COMPENSATION AWARD

There is still left for consideration the relative opportunity available in Louisiana as compared with other states for a correction or modification of the compensation award in the event that it should later develop that some estimate upon which the judgment was based has turned out to be erroneous. Such a comparison is important for present purposes because even though the extent and duration of disability is determined by the judge or commissioner, rather than by the parties, and even though the award is made in terms of continuous weekly payments, nevertheless if the judgment is irrevocable and there is no later opportunity to correct even judicial mis-estimates of disability, there would still remain a need for a formula such as the *Knispel* rule that could serve to minimize the chance that the claimant would be penalized because of a bad judicial guess concerning his future earning capacity.

The extent of the power of Louisiana courts to modify an award of compensation is still, perhaps, a matter for conjecture. R.S. 23:1331 provides in substance that at any time after six months the judgment may be reviewed "on the grounds that the incapacity of the employee has been subsequently diminished or increased, or that the judgment was obtained through error, fraud, or misrepresentation." The chief purpose for which the remedy provided by this section has been invoked has been to

serve the need of the employer or his insurer who later becomes convinced that the employee's disability no longer exists.⁷² It is noteworthy that in these situations the object sought is not in reality a modification of the judgment. The typical compensation award directs the employer to make weekly payments "*during the period of disability*, not exceeding four hundred weeks."⁷³ If thereafter the disability ends, the award ceases to compel payment by its own terms and the employer would be justified technically in discontinuing payments without further ado. However, in order to avoid the risk of penalty or an acceleration of later installments it is much preferable from his point of view to seek what is in effect a declaratory judgment confirming his contention that the continued state of disability upon which his judgment liability depended has come to an end and that the judgment has ceased to be operative. The provision authorizing a modification of judgment serves as a convenient and acceptable vehicle for this purpose.

Instances wherein the worker in Louisiana has succeeded in securing a modification of the award because of a change in his physical condition since the rendition of judgment are virtually non-existent. The reasons are obvious. Continuous adherence to the *Knispel* rule has created a situation wherein awards for only partial disability are rare indeed. Usually the judgment is either for total permanent or for nothing. In the former instance the award is for the full maximum period of four hundred weeks, and there is no occasion for the worker to seek a modification. In the case of awards for scheduled losses there is no basis for modifying the judgment, since these awards are made only where there is no accompanying disability.⁷⁴ One exception, however, should be noted. If a non-disabling injury that results in an award for a specific loss should later become worse so that the worker is disabled, there is ample ground for a modification. In fact, the only instance discovered by the writer wherein a claim-

72. MALONE, LOUISIANA WORKMEN'S COMPENSATION LAW AND PRACTICE § 281, n. 63 (1951).

73. LA. R.S. 23:1221(1), (2), (3) (1950). An award for a fixed number of weeks is also authorized by R.S. 23:1222. This, however, is usually restricted by the courts to cases where it appears that the disability will continue for a period of less than six months.

74. *Trahan v. Louisiana State Rice Milling Co.*, 100 So.2d 914 (La. App. 1st Cir. 1958); *Green v. Harper*, 103 So.2d 474 (La. App. 2d Cir. 1958). See discussion in *Bell v. Employer's Liability Assurance Corp.*, 152 So. 766, 769 (La. App. Or. 1934).

ant succeeded in securing a modification of an award involved this situation.⁷⁵

Occasionally the court, exercising a discretion vested in it by R.S. 23:1222, may fix arbitrarily the number of weeks for payment for temporary disability, based upon the judge's estimate as to the duration of the incapacity.⁷⁶ This type of award may give occasion for a petition by the worker for modification. In one instance this was sought. The claimant maintained that he was totally and permanently disabled and the judgment awarding him compensation was framed on that basis. However, for reasons not clear in the opinion, he was adjudged entitled to compensation for only *three hundred* weeks. Toward the close of this period he sought an additional one hundred weeks — the maximum allowable for total permanent disability. This was denied by the Supreme Court. The opinion emphasized that there could be no greater disability than total permanent (upon which the initial award was based).⁷⁷ The suit for modification was based, therefore, merely upon an error by the trial judge, and this could be corrected only by an appeal from the original judgment filed within the time required by law.

Recently, in *Lacy v. Employers Mutual Insurance Company of Wisconsin*⁷⁸ the Supreme Court has established an additional impediment to any effort to modify a disability award made for a specific number of weeks. Awards of this kind are seldom made except in situations where it appears that the disability will end within six months from the date of judgment. It should also be noted that no modification of any kind is authorized until after the expiration of a six months period. By this time, of course, the judgment will have been fully discharged. Thus there arises the question as to whether modification is available for a judgment that has already been fully satisfied. The court answered this question in the negative in the *Lacy* case, thus closing the

75. *Harris v. Southern Carbon Co.*, 182 So. 370 (La. App. 2d Cir. 1938), applying instructions given in 189 La. 992, 181 So. 469 (1938).

76. MALONE, LOUISIANA WORKMEN'S COMPENSATION LAW AND PRACTICE § 280, n. 47. (1951).

77. *Brown v. Leard*, 131 So. 311 (La. App. 1st Cir. 1930) (with dissenting opinion).

78. 233 La. 712, 98 So.2d 162 (1957). The writer questioned the soundness of this decision in 19 LOUISIANA LAW REVIEW 341, 345 (1959). The same problem has received varied treatment under other statutes. Compare CONN. REV. STAT. § 7434 (1949) (limiting the duration of the reopening period to the duration of the original award) and OHIO CODE § 1456-86 (1948) (allowing a designated period after the last payment of compensation). See generally 2 LARSON, WORKMEN'S COMPENSATION LAW § 81.20 (1952).

door to a modification in virtually the only situation where that type of relief would be sought by the worker. One gains the general impression both here and in other Louisiana decisions⁷⁹ that finality of judgment is of more importance than a continuous supervision over the welfare of the worker. It seems fair to conclude that the prevailing attitude in this state is that the initial determination as to disability should be made in such a way as to reduce to a minimum the chance of any mis-estimate of the worker's incapacity that could later operate to his disadvantage, and that thereafter the case should be regarded as closed.

The power of courts and commissions elsewhere to modify awards varies considerably from jurisdiction to jurisdiction. The statutes are generally similar, however, in two important respects that serve to distinguish them from the situation in Louisiana. First, modification of an award is generally allowable for a change in employment conditions resulting in claimant's inability to get a job.⁸⁰ Any prediction that this would be true in Louisiana would be most incautious. Every instance of modification in the reported cases has been based upon a change in the worker's physical condition. Returning to the modification picture in other states, we find that several of the statutes reserve to the commission a broad continuing jurisdiction over the award.⁸¹ In this respect we can note a sharp difference in attitude in those states whose statutes are administered by commissions as compared with the jurisdictions that adhere to court administration. In the latter group there is a marked tendency to regard the compensation award in the same light as a judgment on any other matter. This attitude, of course, leaves completely out of account the fact that compensation is basically a paternalistic and protective scheme designed to insure to the worker and the public alike that the injured victim will receive a minimum subsistence

79. *Faircloth v. Stearns-Roger Mfg. Co.*, 147 So. 368 (La. App. 2d Cir. 1933); *Brown v. Leard*, 131 So. 311 (La. App. 1st Cir. 1930); *Sweeney v. Black River Lbr. Co.*, 4 La. App. 244 (1926).

80. E.g., *Ray v. Frenchmen's Bay Packing Co.*, 122 Me. 108, 119 Atl. 191 (1922); 2 LARSON, *WORKMEN'S COMPENSATION LAW* § 81.31 (1952).

81. The most serious problem relative to an unlimited power to reopen a compensation award relates to problems of proof and the necessity of preserving records of controversies that were disposed of many years previously. Also insurers justifiably complain of the virtual impossibility of computing reserves to meet contingencies of this kind. New York has met this problem through its Fund for Reopened Cases, supported by an assessment on all carriers. SOMERS & SOMERS, *WORKMEN'S COMPENSATION* 163 (1954). Nevertheless, nine states (Delaware, Georgia, Kentucky, Massachusetts, Minnesota, Nevada, New York, North Dakota and Utah) permit reopening at any time. Other states impose a time limitation of some kind. See the interesting study in DODD, *ADMINISTRATION OF WORKMEN'S COMPENSATION* 206-07 (1936).

and will not become a public charge. Continued interest in the case by the tribunal, be it court or commission, is essential to the attainment of this objective. The compensation scheme should not be left to shift for itself once the controversy has been adjudicated.

A second difference between the approach to modification of an award as it exists in Louisiana as compared with other states relates to the power of the tribunal to modify a judgment based upon a compromise between the parties. We have already observed that freedom of the parties to compromise is more limited in other jurisdictions than in Louisiana. Furthermore, in most jurisdictions the power to reopen is unaffected by any distinction between awards based on agreements and awards in contested cases.⁸² This stands in sharp contrast with the picture in Louisiana, where the compromise agreement, once approved by the court, is a final and conclusive determination of the rights of all parties except in cases of fraud or misrepresentation.⁸³ Here again we find the Louisiana statute by its terms manifesting a keener interest in inducing a final disposition of the controversy than in insuring that the objectives of the compensation scheme should be carried out. Again we have been influenced by the false analogy to ordinary personal injury litigation.

CONCLUSION

Perhaps the foregoing observations have suggested to the reader that the Louisiana disability formula as set forth in *Knispel v. Gulf States Utilities* and which has been carefully preserved by our Supreme Court against encroachment for thirty years is not to be accounted for as a mere piece of judicial inadvertence or as an early misconception by our courts to which they have obstinately adhered. Neither is the rule an instance of sentimentalism inspired by an overly compassionate attitude toward the injured worker. It represents, rather, a definite judicial effort to evolve an effective counterfoil against the rigidity

82. 2 LARSON, WORKMEN'S COMPENSATION LAW § 81.40 (1952). It must be noted, however, that this is not true where the award based upon agreement results in a lump sum settlement. The proper objective here, as pointed out earlier, is to reduce to a minimum the instances in which a lump sum settlement can be made.

83. LA. R.S. 23:1273 (1950); MALONE, LOUISIANA WORKMEN'S COMPENSATION LAW AND PRACTICE § 387, n. 52 (1952). The latest instance is *Griffin v. Coal Operator's Casualty Co.*, 84 So.2d 481 (La. App. 2d Cir. 1955) (settlement made upon mutual assumption that leg bones were held together by a surgical plate, and only matter in dispute was required time for healing; in fact, pins in plate had broken and claimant was totally disabled; settlement held conclusive).

and inflexibility of our scheme for administering compensation controversies and against the legislative tolerance and even encouragement of free compromise practices. Illogical as the *Knispel* rule may appear when viewed in the abstract, perhaps this is the price we must pay for the convenience of compromise and for the dubious benefits of avoiding a commission with more flexible procedures and a continuing jurisdiction over the compensation scheme.